NO. SC86233

IN THE

SUPREME COURT OF MISSOURI

STATE ex rel. THE SCHOOL
DISTRICT OF KANSAS CITY, MISSOURI, et al.,

Relator,

vs.

THE HONORABLE J.D. WILLIAMSON, JR.,

Respondent.

RELATORS' REPLY BRIEF IN SUPPORT OF THEIR SUBSTITUTE BRIEF SEEKING A WRIT OF PROHIBITION

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Relators submit this Reply Brief in Support of their Substitute Brief Seeking a Writ of Prohibition pursuant to Rule 83.08(c) of the Missouri Rules of Civil Procedure.

Table of Contents **Page**

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. Introduction

Westport claims that the Circuit Court had jurisdiction to review the underlying agency proceeding because it had a "right" to a continued charter contract with the School District that required an administrative hearing on the question whether the charter should be renewed. A property interest in a continued contract, such as the charter in this case, can only be created by statute, ordinance, or by an express or implied contract. Clark v. School Dist. of Kansas City, Missouri, 915 S.W.2d 766, 770 (Mo. Ct. App. 1996), citing Bishop v. Wood, 426 U.S. 341, 344 (1976). Westport concedes that there is no evidence that the School District or Westport intended a charter term beyond five years and that the parties' conduct showed an intent that the charter be for a five-year term. Despite the parties' intent, however, Westport argues that because the "District failed to satisfy its statutory obligation to specify the precise term of the contract," the Court should construe the maximum possible term for the contract or an "indefinite" contract term. See Westport's Substitute Brief, p. 29. While the Charter School Act does require charter agreements to contain a specific term, Westport can cite no authority to support its claim that Westport's failure to include a term in its charter application should be construed against the School District to create an indefinite term contract or a contract for the maximum possible term. Moreover, Westport completely ignores § 432.070, regarding contracts involving public school districts, which does not require a contract term. The fact that the Charter Schools Act provides that charters "shall be renewable,"

does not support Westport's claim that the School District must hold a due process hearing before deciding whether to renew the charter. Westport can cite no legal authority for its argument that the parties' option to renew a charter creates a constitutionally protected interest in a continued charter contract.

Additionally, Westport's claim of a due process right to a continued contract based on an alleged indefinite or ten-year charter with the School District also fails. Imposing a ten-year charter term is against the express language of the Charter Schools Act, which provides for a voluntary charter-sponsor relationship and is contrary to the intent and conduct of the parties, which was to have a five-year charter term. Moreover, even if the charter was construed to have an indefinite duration, Westport's agreement that a due process right exists fails. Under Missouri law, a charter with an indefinite term is void under the Charter Schools Act or, at a minimum, terminable at will.

II. A Writ of Prohibition is the Appropriate Remedy Because Relators Challenge The Circuit Court's Subject Matter Jurisdiction and Authority to Issue an Order Granting Preliminary Injunctive Relief to Westport.

A. Relators Do Not Challenge the Circuit Court's Authority to Construe the Relevant Statutes and Facts to Determine if the Court Has Jurisdiction; Rather, Relators Challenge the Court's Continued Exercise of Jurisdiction After It Concluded That the School District Did Not Revoke Westport's Charter

Respondent's Order granting preliminary injunctive relief specifically found that the underlying agency proceeding did not involve revocation of Westport's charter. See Order ¶ 6, L.F., Tab 17, p. 523. Thus, the School District was not required to provide a hearing to Westport pursuant to the revocation procedures in § 160.405.7 of the Charter Schools Act. However, the Circuit Court proceeded to grant Westport preliminary injunctive relief, ordering that the charter could not end until some undefined "statutory procedures" were followed. See Order ¶ 8(b), L.F., Tab 17, p. 524. Westport does not argue that its charter was revoked, but asserts that "Respondent correctly found from the legislative scheme that procedures applicable to revocation should apply full force to non-renewal decisions." See Westport's Substitute Brief, p. 53.

Because the Circuit Court specifically found there was no revocation at issue, the Court should have found that it did not have jurisdiction under the Missouri Administrative Procedure Act ("MAPA") to review the underlying agency proceeding. It is implicit that if there was no revocation of the charter, Westport did not have any statutory or other legal right to a hearing or continued sponsorship. Absent a legal right to a hearing or other legal entitlement at stake, the Circuit Court does not have jurisdiction under the MAPA.

Relators seek a writ of prohibition based on the Circuit Court's construction of the Charter Schools Act because a proper construction of the statute and the facts of this case should lead to the conclusion that the Circuit Court does not have subject matter jurisdiction to review the underlying agency decision.

Westport misunderstands relators' objections to the Circuit Court's continued exercise of jurisdiction over this matter. Westport claims that relators challenge the Circuit Court's ability to even construe the Charter Schools Act or the MAPA to determine if it has jurisdiction. However, relators have always taken the position that, as a preliminary matter, the Circuit Court needed to construe the Charter Schools Act, the MAPA, and the facts of this case in order to determine if the Circuit Court had jurisdiction to review the underlying proceeding. Relators never objected to the Circuit Court's ability to determine whether it had subject matter jurisdiction.

Westport also implies that the Court must defer to the Circuit Court's legal conclusions, which is not required. See State ex rel. Sisco v. Buford, 559 S.W.2d 747, 748 (Mo. 1978) (en banc) (holding that the Supreme Court was not bound by and need not defer to the trial judge's conclusion regarding the legal effect of findings of fact). Moreover, in a writ proceeding, the appellate court "is not conclusively bound by the recitals in the judgment, but may inquire into the determinations of fact upon which the judgment rests." State ex rel. Tannenbaum v. Clark, 838 S.W.2d 26, 31 (Mo. Ct. App. 1992), citing Curtis v. Tozer, 374 S.W.2d 557, 571 (Mo. Ct. App. 1964).

B. Relators Satisfied the Criteria for a Writ of Prohibition

Westport asserts that a writ of prohibition is not available in this case because relators failed to plead and prove that they have no adequate remedy provided by appeal. This claim fails for two reasons. First, according to this Court, a writ of prohibition is proper *in any one* of the following three circumstances: "(1) to prevent the usurpation of

judicial power when the trial court lacks jurisdiction; (2) to remedy [an] excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order." State ex rel. T.W. v. Ohmer, 133 S.W.3d 41, 43 (Mo. 2004) (en banc) (emphasis added), citing State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. 2003) (en banc); see also Missouri State Bd. of Registration for the Healing Arts v. Brown, 121 S.W.3d 234, 236 (Mo. 2003) (en banc) ("A writ of prohibition is appropriate whenever: 1) the trial court exceeded its … jurisdiction; 2) the trial court exceeded its jurisdiction or abused its discretion …; **or** 3) there is no adequate remedy by appeal for the party seeking the writ….") (emphasis added). "A writ is also appropriate 'to prevent unnecessary, inconvenient, and expensive litigation." Brown at 237, citing State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo. 2001) (en banc).

Thus, a party seeking a writ of prohibition may proceed under any one of the above bases. Contrary to Westport's claim, the relator does not have the burden of showing relator has no adequate remedy by appeal, and the court has no obligation to make a finding on that issue. See Brown, 121 S.W.3d at 236. In fact, this Court has issued writs of prohibition without making a finding regarding whether the relator had an adequate remedy provided by appeal. See, e.g., State ex rel. Baker v. Kendrick, 136 S.W.3d 491 (Mo. 2004) (en banc) (granting a writ of prohibition based on the finding that the trial court exceeded its authority); Ohmer, 133 S.W.3d at 43 (same); Brown, 121 S.W.3d at 237 (same).

Westport's claim also fails because, even assuming relators must plead that they have no adequate remedy by appeal, this has been satisfied in this case. In State ex rel. AG Processing, Inc., v. Thompson, 100 S.W.3d 915 (Mo. Ct. App. 2003), the court held that when a party challenges the jurisdiction and authority of an entity to review a matter, this necessarily implies that the party does not have an adequate remedy provided by appeal. Id. at 920. The Court in Thompson explained that the "right to prohibition is not necessarily based on the inadequacy of relief provided by appeal," particularly when there is a challenge to an entity's subject matter jurisdiction to review a matter. Id. (citations omitted). This is because, "[w]here [an entity[1]] is wholly lacking in jurisdiction to hear a case, an appeal is not an adequate remedy because any action by the [entity] is without authority and causes unwarranted expense and delay to the parties involved." Id. at 920 (citations omitted). "Thus, a petition for prohibition is a proper way to challenge an [entity's] participation in a case" for lack of jurisdiction." Id. (citations omitted).

The cases relied on by Westport in claiming that a writ of prohibition is not available either do not support this assertion or are distinguishable from this case. Westport claims on page 12 of its Substitute Brief that this Court held in State ex rel. Ford Motor Co. v. Bacon, 63 S.W.3d 641 (Mo. 2002) (en banc), that a party seeking a writ of prohibition must show that the trial court acted without or beyond its jurisdiction

[1] In Thompson, the relators claimed that an administrative officer lacked jurisdiction to review a matter. The analysis in Thompson applies equally to this case, in that there is a challenge to the Circuit Court's subject matter jurisdiction.

or that irreparable harm will be suffered *and* that there is no adequate remedy on appeal. The Court in Bacon issued a writ of prohibition based on a finding that venue was improper in a certain county. Id. at 642. Contrary to Westport's representations, the analysis in Bacon did not contain any substantive discussion of the grounds on which a writ of prohibition may be granted, including the purported requirement that there be no adequate remedy on appeal. Id.

Westport also cites to Lopp v. Munton, 67 S.W.3d 666 (Mo. Ct. App. 2003), to claim that a writ is not an appropriate remedy. Although the court in Lopp explained that a writ should not be used to circumvent the appeals process, the court *issued a writ of prohibition against the trial judge based upon a finding that the judge did not have subject matter jurisdiction over a Kansas divorce decree until the judge underwent a statutory analysis to determine whether he had subject matter jurisdiction.* Id. at 670, 672. The court in Lopp declined to issue a writ of prohibition on other matters, over which the court specifically found the trial judge had subject matter jurisdiction. Id. at 673. The holding in Lopp therefore implicitly supports the court's analysis in Thompson, 100 S.W.3d at 920, that a challenge to the Circuit Court's subject matter jurisdiction necessarily implies that the party has no adequate remedy to appeal. In such cases, a writ of prohibition is available. Lopp at 672.

Finally, Westport cannot rely on State ex rel. Baldwin v. Dandurand, 785 S.W.2d 547 (Mo. 1990) (en banc), because in that case, the Court declined to issue a writ of prohibition because the orders at issue were final and appealable. Id. at 550. In this case, there is no final order that may be appealed. Westport suggests that relators are required

to undergo the proceeding before the Circuit Court in order to obtain a final judgment before they can properly raise the issue of the Circuit Court's subject matter jurisdiction. This is, however, contrary to the purpose of a writ of prohibition, which is intended to avoid the needless expense and delay in litigating a matter over which the court has no subject matter jurisdiction. Brown, 121 S.W.3d at 236-37. The only other case cited by Westport, State ex rel. Lohman v. Personnel Advisory Board, 948 S.W.2d 701 (Mo. Ct. App. 1997), is not persuasive because in that case, the Court of Appeals affirmed an order quashing a preliminary writ based on its holding that the administrative agency did have jurisdiction. Id. at 705. This case is distinguishable in that there remains a challenge to the Circuit Court's exercise of subject matter jurisdiction.

In this case, relators challenge the Circuit Court's jurisdiction to review the agency decision at issue and to grant an order granting preliminary injunctive relief. Because relators claim that the Circuit Court lacks jurisdiction over this matter, an appeal is not an adequate remedy because relators would otherwise be forced to undergo unwarranted expense and delay by continuing in the proceeding before the Circuit Court until appeal becomes available.

III. The Westport Charter Should be Construed to Be for a Five-Year Term That Did Not Confer Any Right or Expectation in Westport of Continued Sponsorship.

A. Because the Charter Schools Act Specifically Requires that Charters Include a Term of Five to Ten Years and Be Renewable, Westport's

Claim of an Indefinite Charter That Confers a Right to Continued Sponsorship Fails as a Matter of Law

Nothing in the charter at issue states that it is for an indefinite term. Rather, Westport urges the Court to construe the contract to provide for an indefinite term based on the failure to include the required term of five to ten years. In support, Westport cites two cases from other states that have no controlling precedent in this state, Bak-a-Lum Corp. v. Alcoa Building Products, 351 A.2d 349 (N.J. 1976), and Millet Co. v. Park & Tillford Distillers, 123 F. Supp. 484 (N.D. Cal. 1954). Notably, neither of these cases involved a contract with a governmental entity, and neither of the cases contains a holding that an indefinite term contract creates a constitutionally protected property interest in the continuation of the contract. For example, in Bak-a-Lum, the Court held that under the circumstances, a verbal contract on which the plaintiff reasonably relied in making a substantial investment could not be terminated unless "reasonable notice" was given. Id. at 130. The court in Back-a-Lum did not hold that the contract gave rise to any "property right" to a continued contract. Rather, the court held that because the other party to the contract knew of the plaintiff's investment plans, that party had a duty of good faith and fair dealing to give the plaintiff fair notice of termination. Id.

Westport's assertion is contrary to Missouri contract law and the Charter Schools Act. Section 160.405.1(3) of the Act specifically provides that charter agreements "shall be renewable," with a minimum term of five years and a maximum term of ten years. Mo. Rev. Stat. § 160.405.1(3). *Several Missouri courts have held that if a contract is*

renewable, it cannot be for an indefinite duration. See, e.g., Armstrong Business Servs., Inc. v. H & R Block, 96 S.W.3d 867, 877 (Mo. Ct. App. 2002) (holding that a franchise agreement with a five-year, renewable term was not a contract with an indefinite term); Preferred Physicians Mutual Management Group, Inc. v. Preferred Physicians Mutual Risk Retention Group, Inc., 961 S.W.2d 100, 104-105 (Mo. Ct. App. 1998) (holding that a contract with a five-year, renewable term was not a contract with an indefinite term). This is because, as the Supreme Court noted, Missouri courts "are prone to hold against [a] theory that a contract confers a perpetuity of right or imposes a perpetuity of obligation." Paisley v. Lucas, 346 Mo. 827, 143 S.W.2d 262, 270 (1940), quoting James Maccalum Printing Co. v. Graphite Compendius Co., 150 Mo. App. 383, 130 S.W. 836, 838 (1910). Thus, a contract will not be construed to confer a right or impose an obligation in perpetuity unless the language of the contract compels such construction. Id. at 270-71 (citations omitted). The intention to create a perpetual contract must be unequivocally expressed. Id.

Under Armstrong and Preferred Physicians, any contract that is renewable is finite. Because the Missouri legislature mandated that charters be renewable, Westport's claim of an indefinite contract and a right to continued sponsorship fails as a matter of law. Armstrong, 96 S.W.3d at 877; Preferred Physicians, 961 S.W.2d at 104-105. The Court should therefore reject this claim.

B. Even Assuming an Indefinite Term, Westport's Claim of a Continued Right to Sponsorship Fails Because Indefinite Term Contracts Are Terminable At Will Under Missouri Law.

Even assuming that the charter was for an indefinite term, Westport's claim of a continued right to sponsorship fails under Missouri law. It is a well-established principle under Missouri law that, where a written contract does not contain an express term and the evidence does not show the parties' intent with regard to term, the contract is terminable at will by either party as a matter of law. See, e.g., Morrison v. Caspersen, 323 S.W.2d 697, 702 (Mo. 1959) (holding that a contract that fixes no specific termination date is terminable at the will of any party to that agreement); Haith v. Model Cities of Health Corp. of Kansas City, 704 S.W.2d 684, 685 (Mo. Ct. App. 1986) (holding that a written contract that does not contain a term shall, as a matter of law, be held to be terminable at the will of either party); Massachusetts Bonding & Ins. Co. v. Simonds-Shields-Lonsdale Grain Co., 49 S.W.2d 645, 648 (Mo. Ct. App. 1932) (holding that a contract with no express term is terminable at the will of either party). Thus, under Missouri law, Westport's claim of a continued right to sponsorship based on an alleged indefinite term contract fails. Such contracts are, as a matter of law, terminable at will and confer no right to a continued contractual relationship. See Mosley v. Members of the Civil Serv. Bd. For the City of Berkeley, 23 S.W.3d 855, 859 (Mo. Ct. App. 2000) (holding that at-will probationary employee was not entitled to judicial review of the agency decision to terminate her employment because her employment could be

terminated with or without cause); see also San Bernadino Physicians' Servs. Med. Group, Inc. v. County of San Bernadino, 825 F.2d 1404, 1410 (9th Cir. 1987) (holding that a services contract with a governmental agency did not give rise to a constitutionally protected property interest).

Finally, Westport's claim of a due process right to continued sponsorship based on an alleged indefinite contract term fails because it is against the express language of the Charter Schools Act. Section 160.405.1(3) of the Act requires that every charter have a specific term, which cannot be less than five years or greater than ten years, and must be renewable. Mo. Rev. Stat. § 160.405.1(3). If, as Westport claims, the charter was for a perpetual, indefinite term, this would require a holding that the charter agreement is invalid under § 160.405.1(3). Thus, the natural extension of Westport's claim in this case is not that it has a due process right to continued sponsorship – rather, that the charter agreement is void.

In sum, under Missouri law, Westport's claim of a continued right to sponsorship fails, regardless of whether the Court finds an indefinite or definite charter term.

C. The Record in This Case Shows That the Parties Intended a Five-Year Term.

The Court should find that the charter at issue was for a five-year term because that is consistent with the overwhelming evidence presented to the Circuit Court and Westport's admissions in this case. If a contract does not contain an express term, "[t]he intention of the parties with respect to duration and termination of their contract is to be

determined from the surrounding circumstances and from a reasonable construction of the agreement as a whole." First Nat. Bank of Carrollton v. Eucalyptus, 752 S.W.2d 456, 460 (Mo. Ct. App. 1988), citing Union Pac. R.R. Co. v. Kansas City Transit Co., 401 S.W.2d 528, 534 (Mo. Ct. App. 1966). This is again because, "[a]s a general rule, courts will construe a contract to impose an obligation or right in perpetuity only when the language of the contract requires that construction." Id., citing Superior Concrete Accessories v. Kemper, 284 S.W.2d 482, 490 (Mo. 1955).

As addressed fully in relators' Substitute Brief, the overwhelming evidence at the hearing regarding the term indicated that the parties intended a five-year charter term[2]. For example, the undisputed evidence showed that the charter agreement provided that Edison Schools, Inc. ("Edison), would operate Westport's programs and that Edison's and Westport's contract was for a five-year term, ending at the conclusion of the 2003-2004 school year. Several School District representatives also testified that they understood the charter term was for five-years, ending on June 30, 2004. In addition, the Director of Charter Schools for the Missouri Department of Elementary and Secondary

[2] Westport claims that "Respondent stated in Paragraph 11 of his Findings of Fact that because the charter agreement did not expressly state the termination date, the District's position that the agreement terminated on June 30, 2004 unless District affirmatively agreed to renew it was 'untenable.'" See Westport's Substitute Brief, p. 15. However, paragraph 11 of the Order states only "[t]he charter agreement did not expressly state its duration." See Order ¶ 11, L.F., Tab 17, p. 520.

Education testified that she understood the Westport charter had a five-year term and that it ended at the conclusion of the 2003-2004 school year. In its brief, Westport did not point to any factual evidence tending to show any intent for a term exceeding five years.

Moreover, Westport apparently concedes that it never raised any issue regarding the term until it initiated this litigation. See generally Westport's Substitute Brief. Rather, the parties' conduct during the 2003-2004 school year showed that both parties understood the charter to be for a five-year term. For example, after receiving notice from the School District that the charter was going to expire at the conclusion of the 2003-2004 school year, Westport agreed to submit an application for renewal of the charter. After the School District received the application, the School District notified Westport of deficiencies in the application, to which Westport responded by submitting supplemental documentation. See Westport's Substitute Brief, pp. 8-9. Westport also participated in several meetings with School District representatives regarding the renewal, including the meeting at which the School Board voted on renewal. Id. However, never once during its application process or at any of these meetings did Westport claim that it believed the charter was for a term longer than five years. Rather, the record shows that Westport received notice of the expiration of the charter, submitted an initial application, submitted a supplemental application, and participated in the meeting during which the Board of Directors voted not to renew the charter.

The overwhelming evidence presented during the hearing shows that the parties intended a five-year charter term. Prior to this litigation, the parties' conduct also showed

that the parties' intended a five-year charter term. This Court should therefore hold that the term was for five years and that after June 30, 2004, Westport had no continued due process right in continued sponsorship.

D. The Charter Schools Act Should Be Construed Narrowly So That the Charter Applicant and Sponsor Are Bound to an Expressly Agreed Upon Term or, if There is No Express Term, the Minimum Term.

Despite the fact that there is no evidence that Westport and the School District intended the charter to be for a ten-year term, Westport urges the Court to impose a ten-year term on the School District. Westport fails to cite to any persuasive, controlling precedent for its proposition that the School District should be bound to act as sponsor for a ten-year term.

Westport claims that the School District had a "statutory obligation to specify the precise duration of the contract." See Westport's Substitute Brief, p. 29. Westport fails to cite to any statute in support of this claim other than § 160.405.1.(3), and cannot do so because there is no statute imposing such a duty on the School District. In fact, § 432.070 of the Missouri Revised Statutes, which addresses the requirements for a valid contract to which a public school district is a party, does not require the inclusion of a term in a written contract.

Although there is not statutory or case law authority for Westport's position in this case, Westport also attempts to rely on an internal memorandum from the Missouri Department of Elementary and Secondary Education that was only released pursuant to a

subpoena in this case. However, as Westport concedes, agency interpretations, particularly in the form of internal memoranda, have no binding effect on this Court whatsoever. See Lincoln County Stone Co., Inc. v. Koenig, 21 S.W.3d 143, 145 (Mo. Ct. App. 2000); State ex rel. Danforth v. European Health Spa, Inc., 611 S.W.2d 259, 264-65 (Mo. Ct. App. 1980). The Court is particularly under no obligation to defer to the agency interpretation in this case because the interpretation is an internal memorandum prepared by attorneys for the Department. There is no evidence that this interpretation was ever published or otherwise communicated outside the Department.

It appears that the only other basis for Westport's claim that the School District should be bound to a ten-year contract is the arguable public policy behind the Charter Schools Act of providing families with educational choice. However, Westport ignores the express language of the Charter Schools Act and the other equally compelling public policies behind the Act. The express language of the Act provides for a voluntary relationship between a charter school and a sponsor with a finite term that must no less than five years and no greater than ten years. Mo. Rev. Stat. § 160.405. The Court should give these express provisions of the statute meaning. Hovis v. Daves, 14 S.W.3d 593, 595 (Mo. 2000) (en banc). These express statutory provisions protect the interests of both the charter and sponsor. The charter school is provided a minimum time period to establish itself, while avoiding a term that would be unreasonable if the charter school decided it did not want to continue its programs. Sponsors are also protected in that they are not bound to act as sponsor for an unreasonable time period or a time period to which the sponsor did not agree.

If this Court were to accept Westport's argument, the impact on charter schools and their sponsors (and potentially all public governmental bodies) in Missouri would be profound and would ultimately chill the charter school programs in this state (and potentially all public governmental contracts). For example, if a charter school and sponsor failed to specify a term in the charter, under Westport's argument, both would be bound to a maximum ten-year or indefinite term. The effect would be that that the charter school would be forced to continue its operations, even if the charter school decided that operating was not feasible. Westport's argument would also chill potential sponsors from agreeing to act in that capacity out of fear that the sponsor would be bound to a term beyond the sponsor's expectations.

Finally, applying Westport's analysis in this case would result in an overall chill on all public governmental contracts. Westport implies that if there is any public policy supporting a contract, the contract should be construed against the public governmental body to maximize the extent and duration of the contract. Again, there is simply no legal support for this proposition.

Westport also misconstrues the School District's position in this case, claiming that under the School District's analysis, "a charter school whose charter is not renewed or terminated suddenly and without warning even though the contract does not state the expiration date" will have no remedy. See Westport's Substitute Brief, p. 26. This is not true, in that the Charter Schools Act specifically provides for at least a minimum term of five years. If a charter sponsor acts to terminate the charter during the express term of the charter or, if there is no term, before the minimum five-year term, the charter school

would be entitled to a hearing under § 160.405.7 and ultimately to judicial review of the agency proceeding. Mo. Rev. Stat. § 160.405.7.

In sum, the only remaining basis on which Westport relies on in claiming a ten-year contract is the arguable public policy behind the Act of promoting educational choice. However, the express language of the Charter Schools Act provides for a voluntary relationship between a charter and a sponsor that has a definite term. There are also equally compelling public policies in favor of a narrow construction of the statute to ensure this voluntary relationship. The Court should therefore adopt a narrow construction of the Charter Schools Act because it is consistent with the language of the Act and would protect the interests of the charter school and the sponsor and ensure that the parties' intent is followed. Applied to this case, the Court should construe the charter at issue to be for a five-year term.

IV. Westport Has No Entitlement to Judicial Review of the Underlying Agency Proceeding.

As addressed more fully in relators' Substitute Brief, a writ of prohibition is appropriate in this case because the Circuit Court did not have jurisdiction to review the underlying agency proceeding. This is because the Missouri legislature specifically addressed which charter-related decisions are subject to judicial review in § 160.405 of the Missouri Revised Statutes. Under the express language of that statute, Westport's only remedy was to pursue potential sponsorship with the Missouri State Board of Education or another sponsor. Mo. Rev. Stats. § 160.405.2(3). Westport fails to cite to

any persuasive, controlling legal authority that justifies its apparent attempt to circumvent the limited judicial review available under § 160.405.

Even though judicial review under the MAPA may be available for some charter-related decisions, it is not available in this case. The MAPA does not provide for judicial review of all agency decisions. Rather, there is only review of "contested" cases and certain "uncontested" cases. Westport repeatedly argues that its "due process rights" were violated in the underlying proceeding and that it had a "vested" interest in continued operations. However, the mere fact that a contract is renewable does not create any due process right. See Board of Regents v. Roth, 408 U.S. 564, 576 (1972) Mills v. Steger, 64 Fed. Appx. 864, 869 (4th Cir. 2003) (unreported) Bauers v. Board of Regents, 33 Fed. Appx. 812, 816 (7th Cir. 2002) (unreported) Bunger v. Univ. of Oklahoma Bd. of Regents, 95 F.3d 987, 990 (10th Cir. 1996) Windham v. City of New York, 405 F. Supp. 872, 875 (S.D. N.Y. 1976).

Westport fails to cite to any legal authority under which it had a legal entitlement to a hearing in the underlying agency proceeding. Thus, contested case review is not available. See Mo. Rev. Stat. § 536.010 (2); State ex rel. Yarber v. McHenry, 915 S.W.2d 325, 328 (Mo. 1995) (en banc). Westport also cannot invoke jurisdiction to review the underlying agency proceeding as an uncontested case because Westport failed to timely raise this as a basis for subject matter jurisdiction, because § 160.405 limits which charter-related decisions are entitled to judicial review, and because there is no due process right with regard to a school district's decision on renewal of a charter.

Finally, Westport now claims that the Circuit Court has subject matter jurisdiction pursuant to §478.070 of the Missouri Revised Statutes, which simply confers original jurisdiction in the circuit courts over civil and criminal matters. Mo. Rev. Stat. § 478.070. Westport ignores the statutes and the constitutional provision it cited to in its Petition for Judicial Review and Other Relief, including Article V, § 18 of the Missouri Constitution, §§ 536.110-536.140 of the Missouri Revised Statutes, and Supreme Court Rule 100.01. Westport should not be allowed to circumvent the judicial review standards for agency proceedings by now asserting § 478.070.

Under Supreme Court Rule 100.01, "[t]he provisions of §§ 536.100 through 536.150, RSMo, *shall govern procedure in circuit courts for judicial review of actions of administrative agencies unless the statute governing a particular agency contains different provisions for such review."* Mo. R. Civ. P. 100.01 (emphasis added); see also Mo. Const. Art. V, § 18. Thus, unless there is another statute regarding judicial review of an agency decision, judicial review of an agency decision is governed by and limited to those procedures under the MAPA.

In this case, the Charter Schools Act specifically governs a charter school's limited rights to judicial review, thereby removing charter-related decisions from review under the MAPA. See Mo. Rev. Stat. § 160.405; Cooper v. Missouri Bd. of Probation and Parole, 866 S.W.2d 135, 137 (Mo. 1993) (en banc) (holding that statutes specifically addressing judicial review of Parole Board's decisions remove those decision from review under the MAPA); Relations v. Lasky, 959 S.W.2d 872, 873 (Mo. Ct. App. 1997) (holding that statutes specifically addressing judicial review for employment security

matters remove those matters from review under the MAPA). Thus, Westport's only route to judicial review of the charter decision at issue is through those procedures under the Charter School Act. Because the Charter Schools Act does not provide for judicial review under these circumstances, Westport's proper remedy is to seek sponsorship with the Missouri State Board of Education or another sponsor. Mo. Rev. Stat. § 160.405.2(3).

V. The Court Should Grant a Writ of Prohibition Because The Trial Court Exceeded Its Jurisdiction In Ordering the School District to Allow Westport to Occupy School District Facilities.

Westport offers no cases or other legal authority countering the School District's authority to use School District property in a manner it deems fit. Specifically, Westport fails to even address or offer any legal authority countering Coalition to Preserve Educ. of the Westside v. School Dist. of Kansas City, 649 S.W.2d 533, 536 (Mo. Ct. App. 1983); Mo. Const. Art. IX, § 1(a); and Mo. Rev. Stat. § 177.131, under which the School District has the authority to use its property in a manner it deems appropriate. Moreover, this right cannot be delegated or contracted away by the School District. Westside, 649 at 536. Thus, even assuming the charter "contemplated" use of the School District buildings, this is not binding on the School District's duty and right to use its property in a manner it deems appropriate.

Westport admits that it had no lease providing for its occupation of the school buildings. Westport summarily concludes that the School District's reliance on § 432.070

of the Missouri Revised Statutes is unpersuasive, unwarranted, and inequitable, but fails to cite to any case holding that a public school district can be contractually bound to lease its property based on an oral license agreement, an "understanding," or under equitable principles. In fact, any equitable claim Westport may have regarding its use and possession of the buildings also fails under §432.070. See Neal v. Junior College Dist. of East Central Missouri, 550 S.W.2d 580, 582 (Mo. Ct. App. 1976); Goodyear v. Junior College Dist. of St. Louis, 540 S.W.2d 621, 622 (Mo. Ct. App. 1976).

It is ironic that Westport urges the Court to ignore the evidence presented at the hearing regarding the parties' intentions as to the term of the contract, but then urges the Court to consider the parties' intentions with regard to whether there was an oral agreement providing for Westport's use of the buildings. Because Westport concedes that there is no written lease providing for its use of the facilities, this is not a permissible inquiry under § 432.070.

Westport implies that its occupation of the facilities is necessarily tied to its charter with the School District. However, the School District, as the charter sponsor, is under absolutely no statutory or other legal obligation to provide Westport with building facilities. In fact, although the Charter Schools Act contemplates that a sponsor may opt to lease its facilities, the sponsor is under no obligation to do so. The Act specifically provides that "[a] charter school may not be located on the property of a school district *unless the district governing board agrees."* Mo. Rev. Stat. § 160.405.8 (emphasis added). Thus, a sponsor has the *option* of leasing property and is under no obligation to lease the property unless the governing board of the sponsor agrees.

Here, the record is absolutely devoid of any facts suggesting that the School District's Board of Directors agreed to lease Westport the facilities, at no cost to Westport, for an indefinite term as Westport urges. Westport's claims therefore have no factual support.

Westport also claims that a writ of prohibition is not appropriate because it would result in undue hardship for the students and employees currently attending Westport schools. If the School District prevails in this litigation, the School District will implement a transition plan that avoids disruption to the students and their teachers. Under this plan, the students currently attending the Westport schools will still be allowed to attend the schools. Teachers currently working at Westport schools will also be given the option to remain at the schools, provided that those who do not have the required teaching certificates obtain a temporary certificate. Thus, the transition would not cause any material disruption for students and teachers.

Westport's claim should also be rejected because the balance of harms and public interest weigh in favor of issuance of a writ of prohibition. If Westport is allowed to operate pursuant to the Circuit Court's Order, the School District would be forced, although it never contractually agreed to it, to allow Westport to use public school district property for an indefinite term. This is against the express language of the Charter School Act, which provides for a voluntary sponsorship relationship with a finite term to protect the interests of both the charter school and the sponsor. See Mo. Rev. Stat. § 160.405.

Westport's claim of a continued "right" to occupy the public School District's buildings should therefore be rejected.

VI. Conclusion.

For the reasons set forth above and in their Substitute Brief, relators respectfully move the Court to issue a writ of prohibition that prohibits the Circuit Court from granting Westport preliminary injunctive relief and from otherwise exercising subject matter jurisdiction over this matter.

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CERTIFICATE PURSUANT TO RULES 84.06 and 84.06(g)

Pursuant to Mo. R. Civ. P. 84.06, I hereby certify that the forgoing document includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). The forgoing brief contains 7,603 words.

Pursuant to Mo. R. Civ. P. 84.06(g), relators further certify that the floppy disk being filed has been scanned for viruses and that it is virus free.

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Attorney